RECENT DECISIONS

CARRIERS—DUTY TO PASSENGERS—PERSONS RIDING ON TRAINS NOT INTENDED FOR PASSENGERS.—While riding on a freight train of the defendant railroad company, the plaintiff was injured, the injury being caused by a sudden movement of the train of which the plaintiff had no notice. The plaintiff sought to recover on the ground that it was the duty of the trainmen to warn her. *Held*, no such duty exists in such a case. *Block* v. *Chicago, M. & St. P. Ry. Co.* (Minn.), 155 N. W. 1072. For discussion of the principles involved, see 2 VA. L. REV. 300.

CARRIERS—LIABILITY—ACT OF GOD—NEGLIGENT DELAY.—Plaintiff shipped goods over the defendant carrier's line and the transit of the goods was negligently delayed by the carrier. Before reaching their destination the goods were damaged by an extraordinary flood to which they would not have been exposed had it not been for the delay. *Held*, the defendant was not liable. *Seabord Air Line Ry.* v. *Mullin* (Fla.), 70 So. 467. See NOTES, p. 458.

COMMERCE—INTERSTATE COMMERCE—MIGRATORY BIRDS.—Migratory birds were declared by an act of Congress to be under the protection of the federal government. The act authorized the Department of Agriculture to make regulations for their protection. *Held*, the act is unconstitutional. *State* v. *McCullagh* (Kan.), 153 Pac. 557. For discussion of the principles involved, see 2 VA. L. REV. 155.

CONTRACTS—CONTRACTS FOR BENEFIT OF THIRD PARTY—RIGHT TO SUE.—The plaintiff contracted with an improvement board to draw plans for, and supervise the construction of, a water works system. A separate contract was made by the same board with the defendant contractor to construct the system, stipulating in the contract that should the work fail to be completed within a specified time, the contractor should pay the expenses incurred by engineers because of such delay. There was delay and the plaintiffs suffered loss. *Held*, the defendant not liable. *Dickinson* v. *McCoppin* (Ark.), 181 S. W. 151.

The right of a third person to recover on a contract made for his benefit was recognized by the early English cases where there was close blood relation between the promisee and the beneficiary. *Dutton* v. *Poole*, 1 Vent. 318, 332. At a later date a recovery under any circumstances seems to have been denied. *Price* v. *Easton*, 4 B. & Ad. 433. The earlier American cases followed the first English rule. *Felton* v. *Dickinson*, 10 Mass. 287. Though there is much diversity of opinion upon the question, the weight of modern authority would seem to indicate that a third person may recover from the promisor if the promise is upon consideration, is not under seal, and is made primarily for the benefit of such third person. *Hendricks* v. *Lindsay*, 93 U. S. 143;

Buchanan v. *Tilden,* 158 N. Y. 109, 52 N. E. 724, 70 Am. St. Rep. 454, 44 L. R. A. 170; *Lawrence* v. *Oglesby,* 178 Ill. 122, 52 N. E. 945. A few of the American courts deny altogether the existence of such a right. *Borden* v. *Boardman,* 157 Mass. 410, 32 N. E. 469; *Wheeler* v. *Stewart,* 94 Mich. 445, 54 N. W. 172.

The principles of general contract law govern contracts for the benefit of third persons. Consideration is essential, and, as in other contracts it may be either a benefit to the promisor or a detriment to the promisee. *Buchanan* v. *Tilden, supra; Cobb* v. *Herron,* 180 Ill. 49, 54 N. E. 189. It is very generally conceded, however, that the consideration does not have to move from the beneficiary. *State* v. *Gas Light Co.,* 102 Mo. 472, 14 S. W. 974, 22 Am. St. Rep. 789; *Whitehead* v. *Burgess,* 61 N. J. L. 75, 38 Atl. 802. Privity of contract is likewise necessary in cases of this character. *Carnegie* v. *Morrison,* 2 Met. (Mass.) 381; *Brewer* v. *Dyer,* 7 Cush. (Mass.) 337. It is said in some jurisdictions that the promisee must be under some legal or equitable obligation to the third person in order to secure the requisite privity. *Jefferson* v. *Asch,* 53 Minn. 446, 55 N. W. 604, 39 Am. St. Rep. 618, 25 L. R. A. 257; *Union R. R. Storage Co.* v. *McDermott,* 53 Minn. 407, 55 N. W. 606; *Vrooman* v. *Turner,* 69 N. Y. 280, 25 Am. Rep. 195. A few of the older cases, even in this instance, denied a recovery on the ground that the contract is solely for the benefit of the original debtor and therefore he has a right of action for his own indemnity; and if the third person were also allowed to sue, the promisor would be liable to two separate actions. *National Bank* v. *Grand Lodge,* 98 U. S. 123; *Blymire* v. *Boistle,* 6 Watts 182, 31 Am. Dec. 458. Where funds or property are in the hands of another under promise to discharge a debt due from the promisee to a third person, by the weight of authority an action can be maintained by such third person for its recovery. *North Alabama Dev. Co.* v. *Short,* 101 Ala. 333, 13 South. 385; *Watson* v. *Perrigo,* 87 Me. 202, 32 Atl. 876. Estoppel and the obligation implied by law are here the basis of recovery. *Washer* v. *Development Co.,* 142 Cal. 702, 76 Pac. 654. Sufficient consideration between the promisor and promisee is made the sole criterion in other jurisdictions. *Bay* v. *Williams,* 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209; *Marble Sav. Bank* v. *Mesarvey,* 101 Iowa 285, 70 N. W. 198; *Crone* v. *Stinde,* 156 Mo. 262, 55 S. W. 863; *Hare* v. *Murphy,* 45 Neb. 809, 64 N. W. 211, 29 L. R. A. 851. A recovery is very generally denied where it appears that the promisee did not primarily intend to secure a benefit to the third person, for in such cases the necessary privity cannot exist. *German State Bank* v. *North Western Water Co.,* 104 Iowa 717, 74 N. W. 685; *Case* v. *Hoffman,* 100 Wis. 314, 75 N. W. 945, 44 L. R. A. 728; *Walsh* v. *R. R. Co.,* 176 U. S. 469; *Ferris* v. *Carson Water Co.,* 16 Nev. 44, 40 Am. Rep. 485. And a mere incidental benefit accruing to the third person is insufficient. *Freeman* v. *R. R. Co.,* 32 Fla. 420, 13 South. 892; *Lorillard* v. *Clyde,* 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470, 10 L. R. A. 113; *Durnherr* v. *Rau,* 135 N. Y. 219, 32 N. E. 49. An obligation arising between the promisee and a third person subsequently to the making of the original contract is regarded as a mere incident, and not the direct result of the contract itself, so as to have been within the contempla-

tion of the parties. See *Manufacturing Co.* v. *Prather,* 65 Ark. 27, 44 S. W. 218. The principal case falls within this classification.

Where the contract is under seal, the courts are divided in their opinion as to the right of action. In some jurisdictions it is upheld. *Huckabee* v. *May,* 14 Ala. 263; *Fitzgerald* v. *Barker,* 70 Mo. 685; *McDowell* v. *Laev,* 35 Wis. 171. There seems to be no good reason for denying the right of action in such cases, other than the technical rule that a person not a party to a deed cannot sue thereon. *Haskett* v. *Flint,* 5 Blackf. (Ind.) 69, 33 Am. Dec. 452; *Flynn* v. *North Am. Life Ins. Co.,* 115 Mass. 449; *Willard* v. *Wood,* 135 U. S. 309.

CONTRIBUTORY NEGLIGENCE—PUBLIC CROSSINGS—DUTY OF TRAVELLER.—The plaintiff's servant upon approaching a public crossing with a team looked and listened, but did not stop. His view was obstructed by a line of freight cars, and he neither saw nor heard any train. The defendant's train came from behind the cars without giving any previous warning and killed the plaintiff's horse. *Held,* the plaintiffs not guilty of contributory negligence *per se. City of Elkins* v. *Western Maryland Ry. Co.* (W. Va.), 86 S. E. 762.

The railroad and travellers at public crossings have reciprocal rights and obligations, both being bound to the exercise of ordinary care. *Continental Improvement Co.* v. *Stead,* 95 U. S. 161; *Louisville & N. R. Co.* v. *Cummin's Adm'r,* 111 Ky. 333, 63 S. W. 594. Since what constitutes ordinary care varies according to the surrounding circumstances, and the more dangerous the crossing the greater the caution required of both parties, no exact standard can be fixed. *Continental Improvement Co.* v. *Stead, supra; Lake Shore & M. S. Ry. Co.* v. *McIntosh,* 140 Ind. 261, 38 N. E. 476; *Funston* v. *Chicago, R. I. & P. Ry. Co.,* 61 Iowa 452, 16 N. W. 518. All the courts, however, lay down the rule that ordinary care requires a person to look and listen for an approaching train before attempting to cross the track, and failure to do so constitutes contributory negligence barring a recovery. *Schofield* v. *Chicago, M. & St. P. Ry. Co.,* 114 U. S. 615; *Brickell* v. *New York Cent. & H. R. R. Co.,* 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648. But if compliance with the rule would be of no avail due to the track being obstructed, the rule does not apply. *Smedis* v. *Brooklyn & R. B. R. Co.,* 88 N. Y. 13.

In Pennsylvania it seems that in order to exercise ordinary care a person driving a team is bound to stop as well as look and listen before crossing the track, and a failure to do so is negligence *per se. Pennsylvania R. Co.* v. *Beale,* 73 Pa. St. 504, 13 Am. Rep. 753. See *Pennsylvania R. Co.* v. *Weber,* 76 Pa. St. 157, 18 Am. Rep. 407. And it has been suggested that where there are obstructions along the road so that a traveller cannot get a clear view of the track until he is very near it, ordinary care demands that he not only stop but also get out of his vehicle and lead his team across. See *Pennsylvania R. Co.* v. *Beale, supra.* And a recent Virginia case holds that where he cannot get a clear view of the track without getting out of his vehicle and going to a point where he can see around the obstructions, a failure to do so is contributory negligence. *United States Lumber Co.* v. *Shu-*